NOS. 75-6968 AND 76-19

In the Supreme Court of the United States

OCTOBER TERM, 1976

LEONARD E. SWEENEY, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS WARREN HENNING, a/k/a
THOMAS WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals (No. 75-6968, Pet. App. A; No. 76-19, Pet. App. 7-9) was entered on March 23, 1976. Petitions for rehearing were denied on May 24, 1976 (No. 75-6968, Pet. App.

B) and June 8, 1976 (No. 76-19, Pet. App. 10-11). The petition for a writ of certiorari in No. 75-6968 was filed on June 23, 1976, and in No. 76-19 on July 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the evidence was sufficient to support petitioners' convictions for mail fraud (Nos. 75-6968 and 76-19).

The following questions are raised only in No. 75-6968:

1. Whether the government's closing argument violated petitioner Sweeney's privilege against self-incrimination.

2. Whether testimony concerning the effect of fraudulent claims on the losses and profits and premium rates of an insurance company should have been excluded as inflammatory and prejudicial.

3. Whether the indictment was sufficient to charge an offense.

4. Whether the district court erred in denying petitioner Sweeney's motions for a severance.

5. Whether the district court's instructions to the jury were proper.

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner Sweeney was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341, and petitioner Henning was convicted of two counts of mail fraud and of conspiracy to commit those substantive offenses, in violation of 18 U.S.C. 371 and 1341. Sweeney

was sentenced to concurrent three-year terms of imprisonment and fined $1,000 on each count. Henning was sentenced to concurrent four-year terms of imprisonment and fined $500 on each of the mail fraud offenses and $1,000 on the conspiracy offense. The court of appeals affirmed both convictions without opinion (No. 76-19, Pet. App. 7-9; No. 75-6968, Pet. App. A).

The nine-count indictment charged that from March 1, 1973, to February 5, 1974, petitioners and others devised a scheme to defraud the Ohio Casualty Insurance Company and the St. Paul Insurance Company.[1] The overall scheme involved the preparation and submission of falsified medical and employment records to document fraudulent personal injury claims arising out of accidents on April 12, 1973, August 15, 1973, and December 26, 1973.

a. On April 12, 1973, a car driven by co-conspirator David Tompkins, who was insured by Ohio Casualty, struck the rear of a car driven by co-conspirator Roy F. Norris, Jr. Co-conspirators Louis Boscia and Casey Babuscio were passengers in the Tompkins vehicle, while co-conspirators Thomas Robert Gallo and petitioner Henning were in Norris' car (Tr. 53-59, 138, 451-452). Boscia, the central figure in the fraudulent scheme, brought the case to attorney Herbert M. Lurie, who often gave Boscia free legal assistance and loans of money in exchange for case referrals (Tr. 96-102, 256). Lurie agreed to represent Boscia, Babuscio, and Gallo.

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[1]Both petitioners were named in Count One (conspiracy), and substantive Counts Two through Four and Seven. Petitioner Sweeney, also named in substantive Count Eight, was acquitted on Counts One, Two, and Eight and convicted on Counts Three, Four, and Seven. Petitioner Henning was acquitted on Counts Four and Seven and convicted on Counts One, Two, and Three.

Boscia secured powers of attorney from Lurie's clients, gathered false documentation to support the claims for injuries and lost wages, arranged the settlement conferences, and received a share of the settlement money (Tr. 116-121, 152-164, 455-456, 463-464, 506-516). Because Lurie refused to represent Norris and petitioner Henning (who was using the alias Thomas Warren),[2] their claims were referred to petitioner Sweeney, an attorney, who was a former associate of Lurie's firm (Tr. 93-95, 140). Boscia brought Norris to petitioner Sweeney's office and provided materials to support the claims (Tr. 953-955, 980-981, 994).[3] Petitioner Sweeney denied that he did any work on the file, but admitted preparing a letter notifying Ohio Casualty that he represented Norris and "Warren" (petitioner Henning) (Tr. 988-990). Moreover, he sent the insurance company a letter of transmittal and release of the Warren (Henning) claim[4] (Tr. 1004).

b. Using the name Thomas Roberts, co-conspirator Gallo purchased an automobile insurance policy from the St. Paul Insurance Company (Tr. 465-466). Following Louis Boscia's instructions, he increased the amount of coverage from $500 to $5,000 and shortly thereafter Gallo and Boscia agreed to stage an accident (Tr. 467, 469). On August 15, 1973, Boscia drove Gallo's car into a bridge abutment in the presence of Gallo, Norris, co-conspirator

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[2]Lurie had represented petitioner Henning previously and knew him as Thomas Henning (Tr. 140, 829-831).

[3]Petitioner Sweeney admitted that he had previously given Boscia free legal assistance in exchange for case referrals (Tr. 947, 975-979).

[4]The mailings of these letters were the basis for Counts Two and Three of the indictment.

Sabatini, and petitioner Henning (Tr. 469-470). Boscia took Gallo and Norris to West Allegheny Hospital where Gallo stayed for 30 days (Tr. 471-472). Louis Boscia negotiated with Louis Adams, a St. Paul insurance adjuster, for settlement of Gallo's claim (Tr. 473-478).

Thereafter, petitioner Sweeney represented "John T." Boscia in a claim allegedly arising out of this accident. Gallo testified that he did not know a John T. Boscia and that, although he had heard the name mentioned in connection with the August 15, 1973, accident, no John T. Boscia was involved in that accident (Tr. 473).[5] Petitioner Sweeney, however, had prepared and forwarded to St. Paul Insurance Company a letter stating that he represented John T. Boscia who worked for him as a private investigator earning approximately $225 per week. The letter demanded a $25,000 settlement and threatened suit if a response was not received within 15 days (Tr. 592-593, 927-934, 1011-1016).[6] The claim was supported by bogus medical reports and bills for dental treatment allegedly rendered for John T. Boscia by co-conspirator Michael F. DeRosa, D.D.S. DeRosa, however, never performed any medical services for a John T. Boscia (Tr. 519-523).

c. The third accident, which occurred on December 26, 1973, involved a collision between an automobile owned by John B. Sabatini and insured by Ohio Casualty and an automobile owned by Richard Di Achille. Louis Boscia brought to Lurie claims on behalf of the passengers in the Di Achille vehicle, including a John

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[5]This testimony was supported by that of petitioner Henning (Tr. 856-857).

[6]The alleged mailing of this letter was the basis of Count Seven of the indictment. Petitioner Sweeney contended that he gave the letter to Louis Boscia for delivery (Tr. 1017-1018).

T. Boscia. Although a letter of representation was initially forwarded to Ohio Casualty from Luric's office, Lurie declined the case after receiving the file and so notified Louis Boscia, petitioner Sweeney, and Ohio Casualty (Tr. 208-222).[7] Petitioner Sweeney represented the claim of another passenger, co-conspirator John V. Sabatini, son of the owner of the auto insured by Ohio Casualty. Sweeney sent Ohio Casualty a letter advising that he represented Sabatini and other passengers in the Sabatini vehicle (Tr. 1030-1031). After securing medical reports and bills to support Sabatini's claim, Sweeney contacted Leavy, senior adjuster at Ohio Casualty,[8] to discuss settlement (Tr. 1044). Leavy testified that during their meeting on this claim, petitioner Sweeney offered him $1,000 to settle for $13,500, which offer Leavy declined because "[t]he medicals were so close together, the accident occurring December 26th, X-rayed at Columbia, then X-rayed at Monsour, the 27th, and then treated in Nevada, on the 28th" (Tr. 377).

d. Petitioner Sweeney's legal secretary, Katherine A. Putz, handled all typing, filing, and other administrative matters during her employment from June 1972 to October 1973 (Tr. 627-628). She typed the letter of May 8, 1973, from Sweeney to Ohio Casualty indicating his representation of Norris and "Warren" (petitioner Henning), in connection with the accident of April 12, 1973

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[7]Lurie testified that he did not take the case because he "did not know of the existence of a John Boscia, and [it] would have been the third case against Ohio Casualty within the period of a year * * * " (Tr. 222).

[8]Leavy had known Lurie for 20 years and had accepted money from him on many past occasions. The money was never repaid and, according to Leavy, such payments influenced the settlements he made with Lurie (Tr. 105-107, 353-354).

(Count Two); the letter of May 22, 1973, to Ohio Casualty transmitting the release of "Warren's" April 12, 1973, claim (Count Three); the letter of September 10, 1973, to Monsour Hospital in Jeanette, Pennsylvania, requesting medical reports on Norris (Count Four); and the letter of September 13, 1973, to St. Paul Insurance indicating representation of John T. Boscia in connection with the accident of August 15, 1973 (Count Seven) (Tr. 629-641). Although she did not specifically recall mailing the letters, she testified that there was nothing in them to suggest that they would not have been mailed as correspondence in the normal course of business (*ibid.*). Leavy, of Ohio Casualty, never received any hand-delivered letters from petitioner Sweeney; to his knowledge, the letters of May 8, and May 22, 1973, were both handled as routine mail (Tr. 351-353, 367, 404-409).[9]

ARGUMENT

1. Both petitioners challenge the sufficiency of the evidence in support of their convictions of mail fraud. They contend (No. 75-6968, Pet. 29-31; No. 76-19, Pet. 4-6) that the government failed to establish beyond a reasonable doubt that the mails were used to deliver the subject letters. Petitioner Sweeney further argues (Pet. 26-29) that the evidence did not prove that he devised or participated in the scheme to defraud the insurance companies. Neither claim has merit.

a. The testimony of petitioner Sweeney's secretary Katherine Putz that normal office procedure was to mail letters and that there was nothing to suggest the subject letters were not mailed in the normal course of business

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[9]Both petitioners testified in their own behalf and denied complicity in the fraudulent scheme (see, *e.g.*, Tr. 757-760, 774-776, 921-929, 932).

(Tr. 629-641) is sufficient to warrant the inference that Sweeney's letters to Ohio Casualty, St. Paul Insurance, and Monsour Hospital were mailed. Such testimoney as to office practice is sufficient proof of mailing. *United States* v. *Joyce,* 499 F. 2d 9, 15 (C.A. 7), certiorari denied, 419 U.S. 1031; *United States* v. *Flaxman,* 495 F. 2d 344, 349 (C.A. 7), certiorari denied, 419 U.S. 1031. Leavy's testimony that the letters to Ohio Casualty had not been hand-delivered (Tr. 351-353, 404-409) further supported that inference. The fact that neither witness specifically recalled mailing or receiving the letters is not controlling. See Fed. R. Evidence 406. Viewed in the light most favorable to the government (*Glasser* v. *United States,* 315 U.S. 60, 80) the evidence was sufficient to sustain the verdict of the jury, which evidently rejected petitioner Sweeney's claim that the letters were hand-delivered.[10]

b. Petitioner Sweeney claims (Pet. 24-31) that the evidence is insufficient to show that he devised the fraudulent scheme and used the mails in connection with it.

The government did not have to show that the idea for the scheme originated with Sweeney. Proof of his knowing participation in the mail fraud scheme was sufficient. *Hofmann* v. *United States,* 353 F. 2d 188, 191 (C.A. 10); *United States* v. *Gorman,* 390 F. 2d 147 (C.A. 3), certiorari denied *sub nom. Siegal* v. *United States,* 391 U.S. 954. The evidence established that Louis Boscia was the central figure of the fraudulent scheme and that both Lurie and petitioner Sweeney utilized his

[10]Sweeney offered no explanation as to how the letter requesting Norris' medical records from Monsour Hospital in Jeanette, Pennsylvania (Count Seven), could have been delivered other than by mail.

services. Lurie's relationship with Leavy, petitioner Sweeney's relationship with Lurie and reliance on him to negotiate the April 12 claims, Gallo's agreement with Louis Boscia to stage the August 15 accident, and the evidence of fake medical records to support the claims of personal injuries were circumstances from which the jury could infer the existence of both a conspiracy and a scheme to defraud.

Petitioner Sweeney represented claimants allegedly injured in each of the three accidents that occurred within an eight-month period. Moreover, he informed the St. Paul Insurance Company that "John T. Boscia" was employed by him earning $225 per week, when in fact he was not so employed. Leavy testified that petitioner Sweeney offered him a $1,000 kickback in connection with the settlement of Sabatini's December 26 claim.

Thus, viewed in the light most favorable to the government, the evidence was sufficient to support the jury's finding that petitioner Sweeney knowingly joined and participated in the illicit undertaking.

2. Testifying in his own behalf, petitioner Sweeney maintained that it was not he, but Leavy, who requested a $1,000 kickback for settling Sabatini's December 26, 1973, claim (Tr. 931-932). During cross-examination, petitioner Sweeney testified without objection that he had failed to relate this incident to postal inspector Trainor during an investigatory interview because he "couldn't prove it" (Tr. 1045).

The government commented briefly on this evidence during closing argument (see No. 75-6968, Pet. 19-20) in an effort to impeach petitioner Sweeney's credibility as a witness. Petitioner Sweeney contends (Pet. 19-21) that the government's closing argument relating to this

matter violated his privilege against self-incrimination and requires reversal under this Court's decision in *Doyle* v. *Ohio*, No. 75-5014, decided June 17, 1976. This claim is insubstantial. In *Doyle*, this Court found that post-arrest silence following *Miranda* warnings is "insolubly ambiguous" (slip op. 8) and accordingly that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment" (slip op. 10). Unlike the situation in *Doyle*, however, petitioner Sweeney was not under arrest, nor had he yet been indicted at the time of the event in question. And Sweeney's testimony during direct examination that he had never asserted his Fifth Amendment privilege and "[had] no intention to do so" (Tr. 930) eliminates any element of ambiguity in his silence. Cf. *United States* v. *Hale*, 422 U.S. 171. Moreover, petitioner Sweeney, an attorney himself, was questioned in the presence of his attorney and was not under unfavorable surroundings. See *United States* v. *Hale*, *supra*, 422 U.S. at 176-179. In these circumstances, the government's isolated comment on the evidence was not inconsistent with *Doyle*.

3. Government witness William M. Linsenmann, vice president of the Ohio Casualty Insurance Company, explained how fraudulent claims affect his company's losses and profits and insurance premium rates (Tr. 545-551). Petitioner Sweeney argues (Pet. 32-33) that this evidence was inadmissible and "highly prejudicial". However while proof that the scheme succeeded is not necessary in a prosecution for mail fraud, such evidence is admissible. *Farrell* v. *United States*, 321 F. 2d 409, 419 (C.A. 9), certiorari denied, 375 U.S. 992. The government may introduce evidence to establish the effect of the fraudulent scheme and need not confine

its proof to purely monetary loss. *United States* v. *Joyce*, 499 F. 2d 9, 22 (C.A. 7), certiorari denied, 419 U.S. 1031. Moreover, Linsenmann's testimony was not an appeal to the pecuniary interests of the jurors, nor did the prosecution attempt to impassion the jury by commenting on this evidence. Compare *United States* v. *Medansky*, 486 F. 2d 807, 815 (C.A. 7), certiorari denied, 415 U.S. 989, with *United States* v. *Reicin*, 497 F. 2d 563, 574 (C.A. 7), certiorari denied, 419 U.S. 996, and *United States* v. *Trutenko*, 490 F. 2d 678, 679-680 (C.A. 7). The trial in this case lasted eight days and the government presented substantial evidence against petitioner Sweeney. Thus even if the testimony should have been excluded, which we do not concede, its effect was so limited as to render its admission harmless. Cf. *United States* v. *Trutenko*, *supra*, 490 F. 2d at 680. See also *United States* v. *Reicin*, *supra*, 497 F. 2d at 574.

4. Petitioner Sweeney's contention that the indictment failed to state an offense because it did not allege in Counts Three, Four, and Seven that he "knowingly" caused the mailings (Pet. 33-34) is insubstantial. The indictment charges that petitioner Sweeney "for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so did cause [the letters] to be delivered by the United States Postal service according to the directions thereon * * * ." An indictment "is not to be construed in a technical manner, but rather according to common sense." *United States* v. *Pleasant*, 469 F. 2d 1121, 1125 (C.A. 8). See generally *Hamling* v. *United States*, 418 U.S. 87, 117-119. The essential element of knowledge is sufficiently alleged by the phrase, "for the purpose of executing the aforesaid scheme * * * and attempting to do so." "A person may unintentionally cause an

event to occur, but it is impossible for a person to cause an event *for a specific purpose* without knowledge of what he is doing" (emphasis in original). *Glenn* v. *United States*, 303 F. 2d 536, 538-539 (C.A. 5), certiorari denied *sub nom. Belvin* v. *United States*, 372 U.S. 922; *United States* v. *Richman*, 369 F. 2d 465, 467 (C.A. 7).

5. The district court did not err in denying petitioner Sweeney's motions for a severance. The grant or denial of a severance is addressed to the sound discretion of the district court. *Schaffer* v. *United States*, 362 U.S. 511; *Opper* v. *United States*, 348 U.S. 84. Petitioner Sweeney contends (Pet. 35-36) that the court abused its discretion here because "a substantial amount of testimony was admitted which was not relevant or probative as to the consideration of the case against [him]." A severance is not, however, required because some of the testimony at trial may not relate to a particular defendant. *United States* v. *Aloi*, 511 F. 2d 585, 598 (C.A. 2), certiorari denied, 423 U.S. 1015; *United States* v. *Hutul*, 416 F. 2d 607, 620 (C.A. 7), certiorari denied, 396 U.S. 1012. The jury was properly instructed here to apply the evidence separately against each defendant (see *Opper* v. *United States*, *supra*, 348 U.S. at 95), and the differences in the verdicts as to the various defendants and separate counts reflect that the complexity of the evidence did not prevent the jury from following instructions. Cf. *United States* v. *Patterson*, 455 F. 2d 264, 267 (C.A. 9); *United States* v. *Hutul*, *supra*, 416 F. 2d at 620.

Petitioner Sweeney argues (Pet. 36-37) that the joinder of the conspiracy count with the substantive count "substantially prejudiced * * * the presentation of his defense." In support of this contention, he asserts (Pet. 36) that he desired to testify as to the charge of conspiracy only, and to "rest on the record" as

to the substantive offense. But even if petitioner Sweeney would have conducted his defense differently had there been separate trials, severance was not required. See *United States* v. *Weber*, 437 F. 2d 327, 333-335 (C.A. 3), certiorari denied, 402 U.S. 932. Indeed, his defense as to the substantive counts relied heavily on his own testimony that the subject letters were not mailed but hand-delivered.

Finally, petitioner Sweeney claims (Pet. 37) that Counts Three and Four (relating to the April 12 accident) should have been severed from Count Seven (relating to the August 15 accident). However, the different offenses were related to transactions which were "connected together" and "of the same or similar character" within the meaning of Fed. R. Crim. P. 8(a); moreover petitioner Sweeney has failed to show any prejudice warranting severance. Cf. *Breeland* v. *United States*, 396 F. 2d 805, 806 (C.A. 5), certiorari denied, 393 U.S. 847.

6. Petitioner Sweeney challenges (Pet. 21-23, 37-41) various instructions given by the district court. The court's charge to the jury, however, was entirely proper.

a. The court instructed that accomplice testimony "may be of sufficient weight to sustain a verdict of guilty" (Tr. 1141) but that such testimony "must be scrutinized and weighed with care" (Tr. 1142). The court further cautioned the jury: "you should never convict a defendant on the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony establishes guilt beyond a reasonable doubt" (Tr. 1143). Petitioner Sweeney maintains (Pet. 21-23) that under *Cool* v. *United States*, 409 U.S. 100, the court should have instructed the jury that it could acquit, as well as

convict, on the basis of such testimony. In *Cool*, however, the instruction required the jury "to ignore defense testimony unless it believes beyond a reasonable doubt that the testimony is true" (*ibid.*). In this case, the instruction simply prevented the jury from convicting on incriminating accomplice testimony unless it accepted that testimony as true beyond a reasonable doubt; it did not imply that exculpatory testimony must also meet the reasonable doubt test. Moreover, *in Cool* the chief witness for the defense admitted his own guilt, but insisted that the defendant was not involved, and this Court found that testimony "completely exculpatory" (409 U.S. at 101). In the present case, petitioner Henning testified on his own behalf and gave self-exculpatory testimony. He was not testifying on behalf of his co-defendant but, rather, was seeking to establish his own innocence. Indeed, none of the witnesses called by the government exculpated either petitioner. In view of the nature of the accomplice testimony, therefore, this case is not like *Cool* and *United States* v. *Stulga*, 531 F. 2d 1377 (C.A. 6), on which Sweeney relies, but instead is similar to *United States* v. *Vigi*, 515 F. 2d 290, 294 (C.A. 6), certiorari denied, 423 U.S. 912.[11]

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[11]The record also shows that any testimony of government witnesses which might be construed as exculpatory of Sweeney was of minimal evidentiary significance. The fact that Lurie denied (Tr. 242-243) conspiring with petitioner Sweeney did not preclude a finding that Sweeney participated with others in the fraudulent scheme. Thus even assuming that *Cool* always requires an instruction that the jury may acquit if it finds that exculpatory accomplice testimony raises a reasonable doubt, the refusal to give such an instruction was harmless. *Cupp* v. *Naughten*, 414 U.S. 141. See *United States* v. *Armocida*, 515 F. 2d 29, 48 (C.A. 3), certiorari denied *sub nom. Joseph* v. *United States*, 423 U.S. 858.

b. It is well settled that the essential element of knowing use of the mails is established "where such use can reasonably be foreseen, even though not actually intended." *Pereira* v. *United States*, 347 U.S. 1, 9. The court's instruction (Tr. 1121; Pet. 37) accurately stated this as the law and petitioner Sweeney's challenge to this charge (Pet. 37-38) is therefore without merit.

c. The substantive counts of the indictment alleged that petitioner Sweeney "did cause [the letters] to be delivered" and not that he "placed the letters in any post office." Petitioner Sweeney asserts (Pet. 38-39) that the district court "impermissibly broadened the indictment" by reading to the jury the entirety of the relevant statute, 18 U.S.C. 1341, which proscribes, *inter alia*, "plac[ing] in any post office * * * " (Tr. 1118-1119). The record does not support his unsubstantiated claim of prejudice. The proof required to establish that petitioner Sweeney himself actually placed a letter in the mails necessarily would have been sufficient to support the allegation that he "did cause the delivery of the letters.

d. Proof of a mail fraud scheme involving two or more persons is analogous to proof of a conspiracy. An individual participant in such a scheme is liable for the acts of a co-participant that are within the scope of the scheme. *United States* v. *Cohen* 516 F. 2d 1358, 1364 (C.A. 8); *Blue* v. *United States*, 138 F. 2d 351, 359 (C.A. 6), certiorari denied, 322 U.S. 736. The court's instruction (Tr. 1124) properly explained the law and petitioner Sweeney's challenge that it was erroneous because "the principles of the conspiracy law are not applicable" (Pet. 40-41) is groundless.

e. Equally without merit is petitioner Sweeney's argument (Pet. 39-40) that the district court committed

reversible error by refusing to instruct as follows (Pet. 40):

> In a mail fraud prosecution such as the defendants are indicted for in this case it is necessary before you may convict that you are satisfied that the government has proven beyond a reasonable doubt that the defendant devised the scheme and artifice to defraud set forth in the indictment and for the purpose of executing the scheme knowingly caused the mails to be used in the manner set forth in the indictment.

The requested charge is, however, an incomplete statement of the law, on which the court gave thorough instructions (Tr. 1118-1126). As we have shown above (*supra*, pp. 8-9), it was not necessary to prove that petitioner Sweeney himself devised the scheme; it was sufficient to show that he knowingly participated in the use of the mails in executing the scheme of fraud, and the court properly instructed the jury to that effect.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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